

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

THOMAS A. HOGE)	
Claimant)	
)	
VS.)	
)	
CONCRETE SERVICE CO.)	
Respondent)	Docket No. 251,937
)	
AND)	
)	
DEPOSITORS INSURANCE CO.)	
Insurance Carrier)	

ORDER

This is an appeal from Administrative Law Judge (ALJ) Bruce E. Moore's Order denying claimant's post-award request for attorney's fees, but ordering respondent to reimburse claimant's out-of-pocket expenses incurred in connection with the request for additional medical care. In denying the request for attorney's fees, the ALJ explained that claimant's "requests could have and should have been communicated to [r]espondent even before the filing of the [a]pplication for [p]ost [a]ward [m]edical." Because claimant failed to make such a request, the ALJ found the proceedings to be entirely unnecessary and for that reason, he denied the request for attorney's fees.¹ He did, however, order respondent to pay the claimant's counsel's expenses incurred in connection with the post-award request, including \$450 in unauthorized medical allowance for Dr. Flutter's examination.

ISSUES

The claimant alleges the ALJ erred in failing to award post-award attorney fees. Conversely, respondent contends the ALJ correctly denied claimant's request as claimant failed to disclose, in advance of the proceedings, the nature of the medical care he was seeking. Respondent also argues that it should not be responsible for claimant's counsel's out of pocket expenses.

¹ ALJ Order (Oct. 26, 2005) at 5.

The issues to be resolved in this appeal are whether the ALJ properly denied claimant's request for post-award attorney fees, and whether respondent should be responsible for the out of pocket expenses incurred by claimant's counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's post-award Order should be affirmed with certain modifications.

The ALJ set forth the pertinent facts and sequence of events in his Order and the Board adopts those facts as its own, with one exception. The ALJ noted that claimant's prescriptions were being paid by Medicare. This appears to be a misunderstanding as the claimant testified that Medicare does not presently pay for prescription benefits. Claimant testified that his wife's insurance company was paying for his prescriptions, at least until she lost that coverage. In any event, this fact does not alter either the ALJ's analysis, nor the Board's affirmation of his opinion.

Claimant filed a post-award request for medical treatment on the appropriate form, but before the hearing on the request, provided no other indication of precisely what treatment was sought. Respondent's counsel wrote to claimant's counsel and inquired as to the specific nature of the medical treatment being requested. The only response provided was a copy of Dr. Christian A. Whittington's medical records. It was only until the hearing that was held on April 14, 2005, that it became clear that claimant was seeking to have the battery checked in his spinal column stimulator. And even that request was unsubstantiated by any sort of medical opinion or recommendation that it be done. Claimant also seemed to suggest that respondent should pay for the medications Dr. Whittington was prescribing. Claimant provided no itemization of the prescriptions for which he was seeking reimbursement.

During the course of the hearing, the ALJ noted the lack of a specific demand and the lack of any medical opinion as to the need for further treatment. The ALJ suggested claimant utilize his unauthorized medical allowance to obtain a medical opinion on the need for further treatment. As indicated by the ALJ "[c]laimant thereafter expended \$450 for an examination and report with Dr. Fluter, but that report has not been filed with the Court or offered into evidence."²

There is no dispute that Dr. Whittington has been treating claimant since April 2004. It appears that he has been doing so without any authorization from respondent. Dr. Whittington has treated claimant not only for chronic low back pain, which both parties agree stems from his work-related accident which forms the basis for this claim, but for a

² ALJ Order (Oct. 26, 2005) at 2.

variety of other unrelated conditions including high cholesterol, insomnia and respiratory problems.

In reviewing Dr. Whittington's records and his deposition testimony, the best that can be said is that he is managing claimant's medications relative to his low back condition. He did not testify that claimant presently requires any additional medical treatment, although he admits that claimant's condition will flare up periodically and may require physical therapy or an adjustment of his medications.

When faced with this post-award request for medical treatment, respondent repeatedly asked claimant's counsel what treatment was being sought. Unfortunately, counsel never provided a meaningful response to that request. In his brief, claimant's counsel suggests that producing Dr. Whittington's records was sufficient, and that he "was no more able to determine what was specifically being provided for claimant's work-related injury than respondent was."³

The ALJ correctly noted that it is claimant's burden to prove his entitlement to the benefits he seeks.⁴ Like the ALJ, the Board finds it insufficient for a party who seeks additional post-award medical to merely send medical records without some other indicia of what treatment is being sought. Dr. Whittington's medical records do not contain any treatment recommendations. His deposition testimony does not contain any treatment recommendations. Rather, he merely lays out the medications he has prescribed and their purpose. None of the letters from claimant's lawyer explain what treatment is being sought.

The purpose of post-award attorney's fees allowed by K.S.A. 44-510(k) is to serve to deter potential violators and encourage voluntary compliance with the statute involved. Quite plainly, respondent could not voluntarily comply because it was wholly unclear what claimant wanted. Medical records from a general practitioner that do not include any treatment recommendations for the work-related condition cannot possibly constitute a meaningful demand or request. The Board agrees with the ALJ's analysis that any award of attorney's fees would serve only to defeat the policy of encouraging timely compliance by respondents.⁵ The ALJ's Order denying attorney's fees is, therefore, affirmed.

³ Claimant's Brief at 3-4 (filed Nov. 14, 2005).

⁴ K.S.A. 44-501(a).

⁵ See *May v. University of Kansas*, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

As for the ALJ's decision to assess the expenses⁶ incurred by claimant's counsel in connection with the post-award request for medical treatment, the Board concludes the ALJ's decision to award expenses is affirmed, but the amount awarded should be modified.

Included within the list of expenses ordered to be paid was a charge for \$72.50 apparently for Dr. Whittington's deposition. The Board has held and continues to hold that fees charged by treating physicians for an appearance and deposition testimony are generally not assessed to the losing party as costs.⁷ Thus, this charge is not allowable.

The list of expenses also includes a reference to Dr. Flutter and a charge of \$450. This expense is to be paid as unauthorized medical as ordered by the ALJ and not as an expense associated with the post-award request for medical treatment. As for the balance of the expenses, to the extent they comply with the statutory fee schedule they are affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated October 26, 2005, is affirmed in part and modified in part as set forth above.

IT IS SO ORDERED.

Dated this _____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁶ The ALJ limited the respondent's responsibility to those expenses incurred between March 8, 2005 and July 14, 2005.

⁷ *Deming v. National Coop. Refinery*, No. 201,932, 2003 WL 22704135 (Kan. WCAB Oct. 31, 2003).

DISSENTING OPINION

I respectfully disagree with the majority in denying claimant's request for attorney fees. When claimant requested additional medical benefits, respondent declined and, furthermore, respondent did nothing to determine what specific medical treatment, if any, claimant might require. Consequently, claimant initiated a post-award proceeding under K.S.A. 44-510k to pursue additional medical benefits. Following the initial post-award hearing and Dr. Whittington's deposition, respondent agreed to provide medication for claimant's low back and also provide a battery for his dorsal column stimulator. Although hindsight might indicate there may have been a better way to proceed, claimant's attorney rendered valuable services in ultimately obtaining additional medical benefits for claimant. In short, claimant should receive an award of attorney fees.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director